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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

CORNELL SEWARD,

Defendant and Appellant.

C088094

(Super. Ct. No.
STKCRFECOD20160016388)

Appointed counsel for defendant Cornell Seward has filed an opening brief that sets forth the facts of the case and asks this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) We affirm the judgment.

FACTS AND PROCEEDINGS

We provide the following brief description of the facts and procedural history of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 123-124.)

Defendant was identified as one of the shooters in an incident between two rival criminal street gangs where several people were shot and wounded; multiple firearms and ammunition were discovered during a subsequent search of his residence.

Defendant pleaded no contest to three counts of possession of a firearm as a felon (Pen. Code, § 29800, subd. (a)(1) [unless otherwise stated, statutory section references that follow are found in the Penal Code]); two counts of attempted murder, without a premeditation and deliberation allegation (§ 664/187, subd. (a)) by intentionally and personally discharging a firearm (§ 12022.53, subd. (b)); one count of assault with a firearm (§ 245, subd. (a)(2)); and one count of shooting at an inhabited dwelling (§ 246). With the exception of the assault with a firearm and one count of attempted murder, defendant admitted committing these offenses for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)). Defendant subsequently moved to withdraw his no contest pleas, and the court appointed new counsel to represent defendant for that purpose. New counsel averred that he saw no grounds upon which to go forward with the motion to withdraw the plea.

The trial court sentenced defendant to state prison for an aggregate term of 20 years, as follows: the middle term of seven years for one count of attempted murder plus 10 years for the firearm enhancement; a concurrent seven years for the second count of attempted murder plus a concurrent 10 years for the firearm enhancement; a consecutive one-year term, one-third the mid-term, for assault with a firearm; three consecutive eight-month terms, one-third the mid-term, for each count of possession of firearms by a convicted felon; and a concurrent five-year term for shooting at an inhabited dwelling. The court struck the gang enhancements and imposed various fines and fees, including a restitution fine in the amount of \$300, a parole revocation fine in the amount of \$300 (stayed unless and until parole is revoked), a \$40-per-count court operation assessment fee, and a \$30 court facilities assessment; and the court awarded defendant presentence credit for 601 actual days and 90 days conduct credit.

Defendant appeals. He requested a certificate of probable cause, but his request was denied.

DISCUSSION

Appointed counsel filed an opening brief that sets forth the facts of the case and asks us to determine whether there are any arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d 436.) Counsel advised defendant of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days have elapsed, and defendant has not filed a supplemental brief.

We requested supplemental briefing from the parties because the restitution fine and assessments imposed potentially raise the issue recently addressed in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). There, the court held that it was a violation of the defendant's right to due process to impose a restitution fine and court operations and facilities assessments without first determining the convicted defendant's ability to pay. (*Id.* at p. 1168.) Subsequently, in *People v. Johnson* (2019) 35 Cal.App.5th 134 (*Johnson*), the court reasoned that where the defendant is serving a lengthy prison sentence, an ability to pay restitution and assessments can be presumed from the defendant's capacity to earn prison wages. (*Id.* at pp. 139–140, citing *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [a defendant's ability to pay includes "the defendant's ability to obtain prison wages and to earn money after his release from custody"].) Here, as in *Johnson*, the restitution and assessment fees were minimal, the prison sentence is relatively lengthy, and the record does not disclose that defendant is unable to earn prison wages sufficient to pay the restitution fine and assessments. Under these circumstances, we agree with the view in *Johnson* that defendant's ability to pay can be presumed from the record. Accordingly, there is no arguable error based on *Dueñas* that would result in a disposition more favorable to defendant.

We have undertaken an examination of the entire record and find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

HULL, Acting P. J.

We concur:

ROBIE, J.

MAURO, J.